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SAP AG, SAP AMERICA, INC., and
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DECLARATION OF SCOTT TRAINOR IN
SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO MODIFY THE
PROTECTIVE ORDER AND TO COMPEL
DEPOSITION TESTIMONY AND FURTHER
RESPONSES TO REQUESTS FOR ADMISSIONS**

Date: January 26, 2010; Time: 9:00 am
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

1 I, SCOTT TRAINOR, declare:

2 I am a Vice President for SAP America, Inc., one of the Defendants in this case. I make
3 this declaration based on personal knowledge and, if called upon to do so, could testify
4 competently thereto.

5 1. I was deposed on October 13, 2009 by Plaintiffs Oracle USA, Inc., Oracle
6 International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc. (collectively
7 “Oracle”). I am an attorney licensed to practice within the State of California. During that
8 deposition, I was represented as an employee of SAP by Jason McDonell of Jones Day and
9 separately as an individual by Pamela Phillips of Howard Rice Nemerovski Canady Falk &
10 Rabin. I have reviewed the transcript of the deposition. I have also reviewed pages 9-18 of
11 Oracle’s Motion to Modify the Protective Order and to Compel Deposition Testimony and
12 Further Responses to Requests for Admissions (“Motion to Compel” or “Mot.”) and portions of
13 the Declaration of Chad Russell in Support of Oracle’s Motion to Modify the Protective Order
14 and to Compel Deposition Testimony and Further Responses for Admissions (“Russell Decl.”).

15 2. During the portion of my deposition reflected on pages 11 and 12 of Oracle’s
16 Motion to Compel, under the “Compartmentalize” line of questions, Oracle’s counsel asked me if
17 I “compartmentalize[d]—[my] experience” at PeopleSoft. In order to answer this question with
18 any more detail than I have already testified to in response to similar questions, I believe I would
19 have to disclose information that is privileged and confidential to both PeopleSoft and SAP.

20 3. During the portion of my deposition reflected on page 14 of the Motion to Compel
21 under the heading “Communications with Prospective Customers,” I understood Oracle’s counsel
22 to be asking me to explain the phrase “you don’t want us accessing” as I understood it at the time
23 of the deposition. I believed that for me to answer, it would require me to do a legal analysis of
24 some of Oracle’s allegations in the case pending before this Court. I did not understand Oracle’s
25 counsel to be asking me to explain my prior understanding of the phrase “you don’t want us
26 accessing,” specifically, my understanding of that phrase at the time I sent the email reflected in
27 Exhibit 1681. *See* Russell Decl. ¶ 24, Ex. R. (Exhibit 1681). If Oracle’s counsel was asking me
28 to explain my understanding of the phrase as I understood it at the time Exhibit 1681 is dated, I

1 apologize for misunderstanding the question, and I can answer that question without disclosing
2 attorney client privileged communications or protected work product.

3 4. During the portion of my deposition reflected on page 14-15 of the Motion to
4 Compel, under the heading “Misrepresentations to Customers,” Oracle’s counsel asked me: “Is it
5 true that you were conveying to Waste Management the position that TomorrowNow’s rights to
6 use the PeopleSoft software come entirely by way of the Waste Management license with
7 PeopleSoft?” Mot. at 14-15. In response, I testified that that statement was in the document I
8 sent to Waste Management, although I did not and do not recall if I actually drafted that
9 statement. Counsel then asked me: “Was that a true statement as far as you knew?” If by that
10 question counsel intended to ask me whether it is true that TomorrowNow took the position with
11 Waste Management that “TomorrowNow’s rights to use the PeopleSoft software come entirely by
12 way of the Waste Management license with PeopleSoft,” then I can answer that question directly
13 without disclosing confidential or privileged information. If, however, by that question counsel
14 sought from me a legal analysis of that statement, I am concerned that it could require me to
15 disclose confidential and privileged information of PeopleSoft and Defendants. My
16 understanding during the deposition was that Oracle’s counsel had instructed me not to divulge
17 such information.

18 5. During the portion of my deposition reflected on page 14-15 of the Motion to
19 Compel, under the heading “Misrepresentations to Customers,” Oracle’s counsel asked me: “To
20 your knowledge, did SAP or TomorrowNow ever misrepresent facts to customers during
21 negotiation of terms?” I am aware that there is a legal doctrine of “misrepresentation,” and I
22 interpret counsel’s question to request that I perform a legal analysis and draw legal conclusions
23 about whether I am aware of any communications by SAP or TN that constituted actionable
24 misrepresentations.

25 6. During the portion of my deposition reflected on page 15 of the Motion to Compel,
26 under the heading “Indemnification Policy,” Oracle’s counsel asked me: “Turning to Exhibit
27 1684, page ending -861, under the indemnification provision, it reads, ‘Key term -- no removing
28 this.’ Was that true, that this was a key term for SAP, and it would not negotiate this term away?”

1 I cannot answer this question without revealing attorney client privileged communications
2 between employees of TomorrowNow and me. Over the course of my work for TomorrowNow, I
3 had confidential and privileged discussions with Bob Geib, TomorrowNow's head of sales,
4 concerning legal considerations relating to this very same subject matter.

5 7. During the portion of my deposition reflected on page 17 of the Motion to Compel,
6 under the heading "Compliance with ethical obligations," Oracle asked me about my compliance
7 with my ethical obligations. I have consulted with my attorney, Pamela Phillips, in regard to my
8 past and current ethical obligations, and I would not be able to answer these questions without
9 revealing privileged attorney-client communications.

10 8. During the portion of my deposition reflected on page 18 of the Motion to Compel,
11 under the heading "Willfulness of copyright infringement," Oracle's counsel asked me whether
12 SAP or TomorrowNow had taken "any steps to determine whether a particular customer's
13 allowance of access to software constituted copyright infringement?" or ever analyzed "in
14 connection with a negotiation of a contract the general topic of a customer's rights to provide
15 access to software?" I did have discussions with TomorrowNow employees, including Vice
16 President of Sales Bob Geib, about the legal strategy for interacting with customers on the issue
17 of the customers' rights to provide PeopleSoft software to TomorrowNow. Those discussions are
18 privileged. If asked to provide more information, that would cause me to disclose the content of
19 privileged discussions that I had with TomorrowNow employees.

20 9. I have reviewed an unredacted version of TN-OR00852363. This document
21 describes efforts to modify the TomorrowNow Support Services Agreement, which was the form
22 agreement between TomorrowNow and its customers. The redacted sections reflect the content
23 of communications between Bob Geib and myself about legal advice I gave him in regard to
24 modifying the Support Services Agreement.

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1 I declare under penalty of perjury under the laws of the United States and the State of
2 California that the foregoing is true and correct. Executed this _____ day of January 2010 in
3 Palo Alto, California.

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7 _____
8 Scott Trainor
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